

OGC Has Reviewed

OGC 73-2160

19 November 1973

MEMORANDUM FOR: Director of Personnel

SUBJECT : Proposed Guidelines on Administrative Investigations and Interrogations of Federal Government Employees for Wrongdoing Which Involves Possible Criminal Violations

REFERENCES : A. Memo fr Executive Vice-Chairman Interagency Advisory Group to Directors of Personnel, dtd 26 Oct 1973, Same Subj.

B. OGC Opinion 73-1035, dtd 8 Jun 1973 Subj: Warning Interviewees of Their Constitutional Rights

C. Memo for Deputy Attorney General fr General Counsel, dtd 1 Mar 1954, Subj: Reports of Criminal Violations to the Department of Justice

1. You sent Reference A to this Office for our review. As you know this subject matter has been a matter of concern for the Agency for some time and this Office reviewed related legal implications as recently as that contained in Reference B.

2. It appears that the subject guidelines are being proposed for all Government agencies and they will not be limited to those that are bound by Civil Service Commission rules and regulations. This is logical as constitutional issues are involved here which every Government employee inherently is entitled to.

3. After reviewing Reference A we have the following observations:

a. It is our view that paragraph 1 does not modify the Agency's long-standing agreement with the Department of Justice with respect to those cases that the Agency refers to the Department as documented in Reference C.

b. If the United States Attorney declines prosecution (paragraph 6)--we assume that he would so inform us in writing--any further administrative inquiry is not mandatory, but is undertaken only if such is "deemed appropriate" (paragraph 7).

c. It is our view that the procedures outlined are in concert with Reference B. Those procedures outlined in paragraph 8 should overcome the problems as outlined in Kalkines v. United States.

d. The advice given to the employee in paragraph 8e does not, in our view, constitute immunity given by the Agency, but is merely information that has been supplied by the United States Attorney relative to and limited to the criminal matters he has declined to prosecute.

STATINTL

Office of General Counsel

OGC:JED:cap

Original - Addressee

- OGC Subj: CRIMES

1 - JED Signer

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UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF THE EXECUTIVE DIRECTOR
WASHINGTON, D.C. 20415

Mr. John R. Rosen
Executive Director, CSC
Room 1304, Ext. 26177

Mr. John Smith
Executive Vice-Chairman
Clinton Smith
Room 1307, Ext. 26272



OGC SUBJ: CRIMES

Secretary
Room 1304 - 1900 L St. N.W.
Code 101, Ext. 26266 or
Area Code 202 - 632-6266

October 26, 1973

TO: Directors of Personnel

FROM: Clinton Smith
Executive Vice-Chairman

SUBJECT: Proposed Guidelines on Administrative Investigations
and Interrogations of Federal Governmental Employees
for Wrongdoing Which Involves Possible Criminal Violations

The attached material relates to the referral of possible criminal violations to the Justice Department when discovered during the course of an investigation or interrogation of a Federal employee. The material also contains instructions for giving a limited immunity to the person being investigated or interrogated, and a sample waiver form. This material represents a joint effort between the Commission and the Justice Department to arrive at an initial framework for guidelines on this subject matter.

Since the investigative activities of your agency may be affected by these guidelines after they are adopted, your comments and any suggestions for revision are solicited. Your written remarks should be sent to Mr. Travis L. Mills, Office of the General Counsel, no later than November 16, 1973. We, in turn, will consolidate the views of the various offices responding and forward them to the Justice Department.

We are looking forward to receiving your comments concerning the attached material.

Attachment



DRAFT

Proposed Guidelines and Discussion Concerning
Administrative Investigations and Interrogations
of Federal Governmental Employees for Wrongdoing
which Involves Possible Criminal Violations

1. Whenever, in the course of an administrative inquiry, internal investigation, or otherwise, information is obtained which indicates that an employee may have violated Federal criminal laws, the agency, in the absence of any applicable exception referred to in 28 U.S.C. 535(b)(1), (2) and 535(c) shall immediately file a report with the Department of Justice in accordance with 28 U.S.C. 535. This referral is usually made directly to the local office of the Federal Bureau of Investigation (FBI) having jurisdiction over the situs of the possible offense. The FBI will in turn contact the appropriate United States Attorney's office to determine whether further investigative and/or prosecutive action is desired by the Justice Department. The agency should suspend any further administrative investigation and/or interrogation of the employee into the area of suspected criminality. If the agency has a need for urgent action by the Justice Department, it should clearly make such need known in the initial referral or in subsequent contacts with Justice Department officials.

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2. The agency should maintain close liaison with the component of the Justice Department (usually FBI) to which the matter was initially referred.

3. If the United States Attorney wants criminal investigation and/or prosecution, he shall promptly have such desires conveyed to the referring agency. Usually such notification will be conveyed to the agency through the FBI. The Justice Department will strive arduously to advise the referring agency of its initial determination as soon as possible within three weeks of the time the matter was originally brought to the attention of the Justice Department. If, because of the nature of the matter, more time is required to review the matter within the United States Attorney's office, appropriate notice should be given to the referring agency. In all cases, however, the Justice Department should make its best efforts to resolve these matters as expeditiously as possible.

4. If the United States Attorney decides that a criminal investigation or prosecution is desired, such investigation should be conducted in a manner compatible with its importance. While such criminal investigation and/or prosecution is pending, the referring agency should normally refrain from proceeding with its internal

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administrative inquiry. However, if such independent investigative action is desired by the agency, it should be cleared with the FBI in order to insure that such investigative activity does not jeopardize the FBI's investigation. Normally, it is hoped that all differences of opinions in this matter will be resolved at the local level between the appropriate parties. However, should agreement not be reached, either party may bring the situation to the attention of the Criminal Division for resolution.

5. Once the United States Attorney assumes jurisdiction for criminal investigation and/or prosecution the referring agency should take no administrative action without clearing it with the United States Attorney in order to avoid prejudicing the criminal case. The United States Attorney, however, should be mindful of the agency's desires in this area. Normally it has been found that outright termination by the agency does not compromise a criminal case. However, because such actions do risk premature exposure of the criminal case, arrangements should be sought which safeguard the basic criminal aspects but nevertheless permit stringent administrative sanctions on certain vital aspects which

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would warrant such administrative sanctions. As in paragraph 4 above, it is hoped that normally all differences of opinions will be resolved at the local level between the appropriate parties. However, should agreement not be reached, either party may bring the situation to the attention of the Criminal Division for resolution.

6. If the United States Attorney declines criminal prosecution, the matter returns to the agency for administrative consideration. If the United States Attorney has declined prosecution in favor of administrative action, the agency shall advise the United States Attorney of what administrative action was taken by the agency.

7. Administrative inquiry continues if deemed appropriate.

8. If employee invokes his Fifth Amendment privilege during the administrative investigation and an interview of him is deemed desirable, then the agency shall--

- (a) advise the employee that the United States Attorney has declined criminal prosecution of him;
- (b) advise the employee that this is purely an administrative inquiry;

- (c) advise the employee that he has the right to have his own attorney present should he so desire;
- (d) advise the employee that he has a duty as an employee of the agency to answer questions concerning his employment, and the failure to answer could be grounds for dismissal;
- (e) advise the employee that nothing he says will be used against him criminally but may be used administratively;
- (f) advise the employee that no fruits of what he says will be used against him criminally but could be used administratively;
- (g) advise the employee in as particular a manner as possible of the subject areas he will be questioned on. (All those areas can be included for which there are possible criminal violations which have been declined or for which express approval has been obtained from the United States Attorney to make such inquiry);

(h) have the employee sign a written notice and waiver which makes a complete record of the above (a-g). A sample is attached.

9. The agency should not expand the interview to areas of a criminal nature which were not previously brought to the attention of the Justice Department and the go-ahead received.

10. The agency should create an appropriate procedure whereby the questions to and answers by employees after being given the advice referred to and set forth in paragraphs 5 and 6 above are kept in a restricted file which is not made available to criminal investigators or prosecutor for use against that employee (but may be made available for use against third party defendants).

Discussion

There should be no need to seek formal immunity under 18 U.S.C. 6002 and 6004, if the above procedures in paragraphs 8 and 9 are fully complied with. The interview of the subject should be by Q & A and recorded or transcribed and made part of the administrative record. Any electronic transcription of the employee interview, as well as any manual recordation of said interview, should be retained in a secure place by the agency for a reasonable period of years after the administrative proceeding against that employee has been finally concluded.

Also, if at a hearing itself (versus during the investigation) the employee refuses to answer questions because of his right to avoid self-incrimination in regard to the charges against him, his refusal to answer should be considered as the absence of proof to controvert the direct evidence presented against him. Therefore, the charge could be sustained. There should be no need to give an employee immunity either formal or informal when he asserts his self-incrimination privilege during the presentation of his defense. Immunity is only required when the agency is in need of getting certain admissions from the employee in order to sustain its charges. It is not required where the employee wants to justify his conduct which the agency can prove without recourse to information from him, but is afraid his defense will criminally implicate him. ^{1/} This is similar to a criminal case where the defendant has a right to remain silent (i.e., cannot be called by Government to testify against himself), but if he takes the stand he is open to full

1/ Note that if the agency proceeds to take adverse action against the employee because it has evidence to sustain that action without a statement from the employee, either the employee or the U. S. Attorney may request the agency to defer any action on the employee's appeal pending action on the criminal case as noted in paragraph 5 above. In such a case, the agency usually defers to the request.

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cross-examination. The failure by the employee to provide answers to certain questions which are asked of him when there is direct evidence of the existence of such facts which give rise to the question can be considered as a failure to produce evidence to controvert the direct evidence.

SAMPLE WAIVER

This is to acknowledge that on (date) I was advised by _____ (name, title, agency) that the U.S. Attorney for the _____ has agreed not to pursue criminal proceedings against me in the matter of _____, which is also the subject of an administrative inquiry being conducted by (name of agency). In connection with this administrative inquiry, I understand that I may be asked questions relating to:

(specify insofar as possible), and that while my answers to these questions or the fruits of my answers to these questions cannot be used against me in a criminal proceeding they could be used administratively. I further understand that failure to answer questions in this administrative proceeding could be a basis for dismissal.

_____ (date)

_____ (signature)

WASHINGTON, D.C. 20505

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30 November 1973

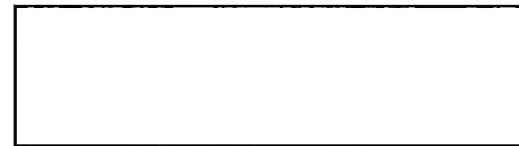
Mr. Travis Mills
Office of General Counsel
Civil Service Commission
Room 5H-30
1900 "E" Street, N. W.
Washington, D. C.

Dear Mr. Mills:

Confirming our conversation today, this Agency has no problem with the proposed guidelines prepared by the Department of Justice and the Commission which are intended as an initial framework for guidance to all agencies. Indeed we believe they will prove helpful to this Agency and, I am sure, others as well.

STATINTL

Yours very truly,



Associate General Counsel

cc: 

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1 - OGC SUBJ: CRIMES

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